

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE
DIVISION IV

CA06-1483

STEPHANIE EMBERG and RICHARD
MYERS

May 9, 2007

APPELLANTS

APPEAL FROM THE CRAIGHEAD
COUNTY CIRCUIT COURT
[NO. JV-2006-10]

V.

ARKANSAS DEPARTMENT OF
HEALTH and HUMAN SERVICES

HON. LARRY BOLING,
JUDGE

APPELLEE

AFFIRMED

Appellants Stephanie Emberg and Richard Myers, parents of RBM, appeal the October 9, 2006, decision of the Craighead County Circuit Court terminating their parental rights. On appeal, both parents contend that the trial court erred in finding that appellee Arkansas Department of Health and Human Services (DHHS) proved by clear and convincing evidence that their parental rights should be terminated. We affirm.

The three-month-old child, RBM, was removed from the mother's care on February 24, 2005, after police, in response to domestic violence between the mother and father, notified DHHS. DHHS removed the child due to environmental neglect, the mother's suspected drug use, and the mother's eviction from her home, which resulted in her having no suitable home for the child. The mother and father, though not married, had maintained a relationship for the last eight years. An order was filed March 3, 2005, finding probable cause that the child was dependent-neglected and that an emergency existed that necessitated

removal of the child from the mother's care and placing the child into the custody of DHHS. The order stated that the father acknowledged paternity of the child and established visitation for both parents. The goal of the case at that time was reunification with the mother. Both parents were ordered to complete parenting classes, and the mother was ordered to do the following:

- (a) Submit to a drug and alcohol assessment;
- (b) Submit to random drug screens at DHHS's request;
- (c) Obtain and maintain stable housing and employment;
- (d) Submit to a psychological evaluation and follow the recommendations thereof;
- (e) If the mother does not enter a rehabilitation facility, contact DHHS when released from incarceration regarding her address.

A review order from the November 14, 2005, hearing, which was filed January 3, 2006, stated that the child was to remain in the custody of DHHS. The mother had completed parenting classes and a drug-and-alcohol assessment had been performed. However, she did not have stable housing at that time. Further, she had not submitted to a psychological evaluation, but one was scheduled for November 16, 2005. The goal of the case remained reunification. The case was transferred by this review order from Mississippi County to Craighead County.

The case plan filed April 18, 2005, required that both parents be referred for psychological evaluations and monthly random drug screens, complete parenting classes, and visit with the child weekly. The adjudication order filed May 13, 2005, continued the goal of the case as reunification and ordered the parties to do the following:

- 9. The father is ordered to complete parenting classes.
- 10. The mother is ordered to:
 - (a) obtain and maintain stable housing and employment;

- (b) complete parenting classes;
- (c) submit to random drug screens;
- (d) submit to a psychological evaluation and follow the recommendations thereof;
- (e) submit to a drug and alcohol assessment and follow the recommendations thereof;
- (f) enroll and complete inpatient substance abuse treatment.

During the time period between February 24, 2005, and August 31, 2006, the mother tested for drugs with the following results:

negative		October 11, 2005
positive	THC and amphetamines	November 15, 2005
positive	THC, methamphetamine and amphetamines	December 21, 2005
positive	THC, methamphetamine and amphetamines	December 28, 2005
negative		January 10, 2006
positive	THC	February 2, 2006
positive	THC, methamphetamine and cocaine	February 8, 2006
positive	THC, methamphetamine and cocaine	February 22, 2006
positive	cocaine	March 1, 2006
positive	cocaine	April 12, 2006

The father's drug-test results were positive for cocaine on or around April 12, 2006.

On March 7, 2006, the amended petition for termination of parental rights was filed, and a hearing was scheduled for March 30, 2006. At the hearing, the father's attorney moved to withdraw as counsel for the father, and the hearing was continued until July 11, 2006. At that time, the mother's attorney moved for a continuance, and that motion was granted. However, the trial court did complete a permanency-planning hearing that day, and the court found little likelihood of successful reunification with the parents. The goal was changed to termination of parental rights and adoption.

The termination hearing was held August 31, 2006, and the trial court found that the mother had been diagnosed with bi-polar disorder at the age of sixteen and that she takes medication to control it. The minor child, born November 21, 2004, remained in the custody of DHHS from February 24, 2005, until the hearing date of August 31, 2006, which is a period of nineteen months. The trial court found the evidence clear and convincing that, as of the permanency planning hearing of July 11, 2006, the mother had not: obtained and maintained stable and appropriate housing, as demonstrated by her residence at motels for extended periods of time; demonstrated that she had or could implement the parenting skills taught in parenting classes; obtained and maintained stable employment; followed the recommendations of the psychological evaluation regarding medication, treatment, counseling and development of assertiveness skills and individualization skills; remained drug free; completed a formal substance-abuse treatment program or an after-care program; exercised all opportunities for visitation because of lack of transportation and her failure to request transportation at least twenty-four hours in advance; presented herself at all times in an appropriate condition to exercise visitation; kept appointments for referred services; accepted services offered by DHHS and its service providers.

The trial court found that between February 28, 2005, and August 31, 2006, the mother had been incarcerated twice, with one term being at least six months. The father had been incarcerated one time during the same period. The parties lived at six locations, other than jail, between February 28, 2005, and April 18, 2006. Three of those locations were motels.

Visitation with the child was sporadic due to incarceration and positive drug screens, but the trial court found that since May 2006, the parents visited RBM regularly. Further, despite the mother's in-patient substance-abuse treatment at Agape House, which she began in April 2006 and successfully completed in August 2006, the one-year lease on a trailer, the father's job at K and R Auto Salvage for three months, the mother's job working for Staffmark Temporary Services, and the fact that the parents attend church regularly, the trial court found that the parent's last-minute efforts toward the case plan were not compelling enough to grant them additional time to achieve reunification. After the hearing held August 31, 2006, parental rights were terminated by order filed October 9, 2006, and this appeal was timely filed on October 23, 2006.¹

The standard of review in cases involving the termination of parental rights is well established. Arkansas Code Annotated section 9-27-341(b)(3) (Supp. 2005) requires an order terminating parental rights to be based upon clear and convincing evidence. *Camarillo-Cox v. Ark. Dep't of Human Servs.*, 360 Ark. 340, 201 S.W.3d 391 (2005). Clear and convincing evidence is that degree of proof that will produce in the fact finder a firm conviction as to the allegation sought to be established. *E.g., Lewis v. Ark. Dep't of Human Servs.*, 364 Ark. 243, ___ S.W.3d ___ (2005). When the burden of proving a disputed fact is by clear and convincing evidence, the question that must be answered on appeal is whether the trial court's finding that the disputed fact was proven by clear and convincing evidence was clearly erroneous.

¹We note that the trial court is required to file an order within thirty days of the termination hearing. *See Ark. Sup.Ct. R. 6-9(a)(2)*.

Id. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Gregg v. Ark. Dep't of Human Servs.*, 58 Ark. App. 337, 952 S.W.2d 183 (1997). Such cases are reviewed de novo on appeal. *Wade v. Ark. Dep't of Human Servs.*, 337 Ark. 353, 990 S.W.2d 509 (1999). However, appellate courts do give a high degree of deference to the trial court, as it is in a far superior position to observe the parties before it and judge the credibility of the witnesses. *Dinkins v. Ark. Dep't of Human Servs.*, 344 Ark. 207, 40 S.W.3d 286 (2001).

Arkansas Code Annotated section 9-27-341(b) provides in pertinent part as follows:

(3) An order forever terminating parental rights shall be based upon a finding by clear and convincing evidence:

(A) That it is in the best interest of the juvenile, including consideration of the following factors:

(i) The likelihood that the juvenile will be adopted if the termination petition is granted; and

(ii) The potential harm, specifically addressing the effect on the health and safety of the child, caused by returning the child to the custody of the parent, parents, or putative parent or parents; and

(B) Of one (1) or more of the following grounds:

(i)(a) That a juvenile has been adjudicated by the court to be dependent-neglected and has continued out of the custody of the parent for twelve (12) months and, despite a meaningful effort by the department to rehabilitate the parent and correct the conditions that caused removal, those conditions have not been remedied by the parent.

(vii)(a) That other factors or issues arose subsequent to the filing of the original petition for dependency-neglect that demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety, or welfare and that, despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances that prevent return of the juvenile to the custody of the parent.

(ix)(a) The parent is found by a court of competent jurisdiction, including the juvenile division of circuit court, to:

. . .

(3)(A) Have subjected any juvenile to aggravated circumstances.

(B) "Aggravated circumstances" means:

(i) A juvenile has been abandoned, chronically abused, subjected to extreme or repeated cruelty, sexually abused, or a determination has been made by a judge that there is little likelihood that services to the family will result in successful reunification. . .

Ark. Code Ann. § 9-27-341(b)(3)(A), (B)(i)(a), (vii)(a), (ix)(a)(3)(A)-(B)(i).

When the issue is one involving the termination of parental rights, there is a heavy burden placed upon the party seeking to terminate the relationship. *Ullom v. Ark. Dep't of Human Servs.*, 340 Ark. 615, 12 S.W.3d 204 (2000). Termination of parental rights is an extreme remedy in derogation of the natural rights of the parents. *Id.* Nevertheless, parental rights will not be enforced to the detriment or destruction of the health and well-being of the child. *Crawford v. Ark. Dep't of Human Servs.*, 330 Ark. 152, 951 S.W.2d 310 (1997). Parental rights must give way to the best interest of the child when the natural parents seriously fail to provide reasonable care for their minor children. *J.T. v. Arkansas Dep't of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997).

The mother argues that she remedied the conditions which caused removal of RBM from her custody. She claims that the child was removed from her for inadequate food, failure to have a residence as a result of eviction, and suspected drug use. By the time of the termination hearing held on August 31, 2006, she claims that she had fully complied with each and every court order and the case-plan requirements. She contends the following: she successfully completed her in-patient drug treatment prior to August 31, 2006; she completed

the court-ordered drug-and-alcohol assessment during her incarceration from February 24, 2005, through August 2005; she completed the court-ordered psychological evaluation in November 2005; she completed parenting classes through DHHS on November 8, 2005; she obtained employment through a temporary agency during her in-patient treatment at Agape House, and was still employed at the same place in August 2006; she obtained a home after completing her in-patient treatment and was residing in that same home on August 31, 2006; she had negative drug screens from mid-April 2006 through August 31, 2006.

The mother claims that no issues arose subsequent to the filing of the dependent-neglect petition that demonstrated that return of the child to her was contrary to the child's health, safety, or welfare. *See* Ark. Code Ann. § 9-27-341(b)(3)(B)(vii)(a). Further, she argues that she did not manifest the incapacity or indifference to remedy the conditions which caused removal of the child from her custody. *See id.*

DHHS contends that she demonstrated her indifference or incapacity to rehabilitate her circumstances by her: a) drug use; b) lack of appropriate housing; c) lack of regular employment; d) failure to address mental-health and substance-abuse issues; e) instability. The trial court commented that her progress was too recently achieved to judge with any degree of certainty its permanency. The mother argues that this finding is in direct conflict with the time frame within which the trial court allowed this case to proceed, and in which the attorney for DHHS proceeded. Further, she argues that the delay the trial court refers to regarding drug treatment is not a result of indifference, but the result of twenty-two years of drug use. Her actions did not show indifference, but instead, she argues her actions showed

that she needed additional time to recognize the importance of changing her entire lifestyle, accepting responsibility, and getting help. Because of her substantial achievement, she argues that the trial court erred in terminating her parental rights.

Finally, the mother argues that she did not subject the juvenile to aggravated circumstances as there was insufficient proof that there was little likelihood that services to the family would result in successful reunification. See Ark. Code Ann. 9-27-341(b)(3)(B)(ix)(a)(3)(B)(i). DHHS argues and the trial court held that the child had been out of the custody of the mother for a period of at least eighteen months at the time of the termination hearing, and reunification was not likely to occur within a reasonable period of time as viewed from the child's perspective and in a time frame consistent with the developmental needs of the child.

The mother argues that the juvenile code does not mandate termination of parental rights as soon as the children have been out of their parent's custody for more than twelve months. See *Benedict v. Ark. Dep't of Human Servs.*, 96 Ark. App. 395, __ S.W.3d __ (2006). The mother claims that she only needed a little additional time for reunification so that the following services could be completed by DHHS: 1) complete a walk-through of the mother's home; 2) administration of a few more random drug tests; 3) confirmation of the mother's counseling and medication management; 4) provision of a transition period for increased visitation. The mother argues that these services could have been completed before the termination hearing, and the trial court could have placed the child with her, under the supervision of DHHS.

The mother contends that the trial court failed to consider that the child was very young and had not begun school at the time of the termination hearing. She claims that the trial court failed to consider that RBM has a half sibling with whom his relationship would be forever severed by termination and subsequent adoption. She claims that DHHS offered no proof that continued reunification efforts with her would have been detrimental to the developmental needs of the child.

DHHS argues that the trial court correctly found that the mother had not remedied the conditions that caused her child to be placed in foster care. DHHS cites *Carroll v. Arkansas Department of Human Services*, 85 Ark. App. 255, 148 S.W.3d 780 (2004), for the proposition that a parent's failure to maintain stable housing after their children are in foster care is sufficient evidence to find that the parent is indifferent to remedying their issues. Also, DHHS cites *Camarillo-Cox v. Arkansas Department of Human Services*, *supra*, for the proposition that improvements made by the parent at the "eleventh hour" are not enough to prevent termination of parental rights. DHHS urges this court to look at what the mother did in the first twelve months of the case to determine whether she remedied her conditions in a reasonable amount of time from her son's perspective. DHHS points out that the mother did not have stable housing during most of the twenty-two month case, and in fact lived in six different locations.² This court agrees with DHHS in its argument that appellant's progress

²Although DHHS characterizes the case as lasting twenty-two months, we calculate the time period covered by this case from the date the child was taken into DHHS custody, February 24, 2005, to the date of the termination of parental rights hearing, August 31, 2006, which is eighteen months.

was made in the last three weeks of the case, when she obtained a residence and a job. Therefore, DHHS contends, and we agree, that appellant had not achieved any meaningful degree of stability during the pendency of this action.

DHHS further argues that there is sufficient evidence to find that the mother was indifferent to remedying her conditions. In *Carroll, supra*, the court held that a parent's continued drug use after her child is in foster care, in itself, is sufficient evidence to find that the parent is indifferent to remedying her issues. Here, the mother began using drugs again immediately upon her release from jail in August 2005. She had only been sober for three months by the end of these protracted proceedings. We accept DHHS's claim that appellant's sobriety was too late in the case to be given much weight.

DHHS admits that it did not obtain the mother's drug and alcohol assessment and provide her a copy for many months. However, DHHS workers requested that she be reassessed, but she refused. Had she been cooperative and participated in a reassessment, she could have completed her drug treatment much earlier. DHHS argues that the mother knew she had a drug-abuse problem that spanned more than twenty years, and she did not want to attend in-patient treatment. Her drug screens showed positive results for marijuana, cocaine, methamphetamine, and amphetamines at various times during the course of this action until her admission to Agape House in April 2006. We agree and hold that appellant's unwillingness to participate in drug treatment is evidence in support of terminating her parental rights, as it demonstrates her indifference to remedying her conditions.

Finally, DHHS argues that the trial court was correct in finding that she subjected her son to aggravated circumstances. Here, those circumstances were that reunification was unlikely. In *Trout v. Arkansas Department of Human Services.*, 359 Ark. 283, 197 S.W.3d 486 (2004), our supreme court affirmed the termination of a mother's parental rights where the mother could not remain stable enough for a sufficient time to indicate that reunification was possible. DHHS concludes that in the instant case, the mother, like the mother in *Trout*, consistently failed to follow the trial court's orders. She did not complete at least two prior drug-treatment programs. She used drugs during most of the case. Therefore, her last-minute efforts to show she changed her lifestyle were too little, too late. We agree.

The father argues that the trial court erred in terminating his parental rights because he had complied with all orders. He argues that he was ordered to do only one thing - complete parenting classes. His paternity was established on April 14, 2005. He claims that he complied with the case plan, attended visitation with his son, and completed parenting classes. He contends that there was no case plan filed requiring him to do anything further. Without a court order, he attended meetings designed to help him deal with drug-related and parenting issues that might arise.

The father claims that the trial court listed the reasons for termination of his parental rights as "lack of appropriate housing" and "lack of regular employment." He argues that these issues were not issues addressed by a court order prior to the termination hearing. However, the father claims that he dealt with these issues by securing both a home and a job.

DHHS argues that the father did not remedy the conditions that caused his child to

be removed from his custody. Even though the father claims that he was not required to participate in reunification services by any court order, DHHS points out that the adjudication order required him to complete parenting classes, which he did. Further, the first case plan required him to participate in drug testing and to obtain a psychological evaluation. Even though he was not ordered to maintain stable housing, DHHS argues that for him to regain custody, he needed an appropriate and safe home for his child. He only acquired housing in the last three weeks of the case. DHHS contends, and this court agrees, that in light of the father's lack of participation in services, the trial court's findings were not clearly erroneous.

Affirmed.

HART and ROBBINS, JJ., agree.